United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-4271

Signed

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ANTHONY and MARTHA M. DALLACASA,

Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM A DECISION OF THE

UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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STATEMENT OF THE ISSUE PRESENTED

Whether taxpayers' attempted appeal from a stipulated decision in the Tax Court should be dismissed for lack of jurisdiction or, in the alternative, whether the decision of the Tax Court should be affirmed.

STATEMENT OF THE CASE

This is an attempted appeal from a stipulated decision in the Tax Court (Judge Simpson) in which deficiencies totalling $2,665.72 in federal income taxes and penalties relating to those taxes totalling $497.51 were determined against Anthony and Martha M. Dallacasa (taxpayers) for their tax years 1966 and 1967. (R. 16-17.)[1/] The decision of the Tax Court was entered on July 22, 1975. (R. 3.) Taxpayers filed a notice of appeal on October 1, 1975. (R. 3.) As will be more fully explained, infra, the normal statutory grant of jurisdiction in this Court over decisions of the Tax Court, Section 7482 of the Internal Revenue Code of 1954, is not applicable in this case since the decision entered below was stipulated by the parties.

The facts relevant to this case, as reflected by the record, may be summarized as follows:

On July 12, 1973, the Commissioner of Internal Revenue, pursuant to Section 6212 of the Internal Revenue Code of 1954 (26 U.S.C.), issued a notice of deficiency to taxpayers, asserting deficiencies in federal income tax totalling $3,417.76 and additions to tax (penalties) totalling $633.37 due from taxpayers for their taxable years ending December 31, 1966 and 1967. (R. 7.) The deficiencies stemmed largely from unreported income which was attributed to taxpayers on the basis of

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1/ "R." references are to the separately bound record appendix. Because the pages in the record appendix as filed were not numbered, we numbered the pages (starting with the "notice of appeal") one through twenty and will cite to those page numbers in this brief.

unexplained deposits in their bank accounts during the years in question. (R. 20.) The five-percent negligence penalty (Section 6653(a) (26 U.S.C.)) was asserted for both years and the penalty for failure to file timely the return was asserted for 1967. (R. 8.) Sec. 6651(a)(26 U.S.C.). On October 11, 1973,[2/] taxpayer (Dallacasa is an attorney) filed a petition in the Tax Court seeking a redetermination of the deficiencies and penalties so asserted. (R. 3-5.) Some 18 months later, on April 21, 1975, after the case had been set for trial, the Tax Court ordered that the case be continued for settlement purposes. (R. 15.) Subsequently, on July 22, 1975, pursuant to an agreement between the parties, the Tax Court entered a decision against taxpayers in the total amount of $3,163.23. (R. 16-17.)

Taxpayers filed a notice of appeal from the stipulated decision on October 1, 1975. (R. 1-3.) They did not docket their appeal in this Court, however, until December 9, 1976, when this Court granted their motion to docket the appeal out of time.

2/ The 90-day period prescribed in Section 6213(a) of the Internal Revenue Code of 1954 (26 U.S.C.) for the filing of a petition to the Tax Court would have expired on October 10, 1973; but the petition in this case, although "filed" on October 11, 1973, had been mailed on October 9, 1973 (as shown by the postmark), and therefore must be treated as timely filed pursuant to the timely mailing is timely filing provision of Section 7502 of the Code (26 U.S.C.).

ARGUMENT

THIS ATTEMPTED APPEAL FROM A CONSENTED DECISION IN THE TAX COURT SHOULD BE DISMISSED OR, IN THE ALTERNATIVE, THE DECISION SHOULD BE AFFIRMED

Taxpayers' attempt by this appeal to have this Court vacate the decision to which they consented in the Tax Court on the grounds of mistake or newly discovered evidence is spurious and must fail. Section 7482(a) of the Internal Revenue Code of 1954, Appendix, infra, generally confers jurisdiction on Courts of Appeals to review decisions of the Tax Court. Section 7481(a)(1), Appendix, infra, provides that a decision of the Tax Court becomes final upon the taxpayers' failure to file a timely notice of appeal.[3/] Accordingly, if a valid notice of appeal from a decision is not, or cannot, be filed within the prescribed 90-day period, the Tax Court's decision is final and no appeal should be allowed.

It is well established that only a party who is "aggrieved" by a decision of a lower court may prosecute an appeal from that decision. Lewis v. United States, 216 U.S. 611 (1910). Patently, one who consents to the entry of a decision against himself is not "aggrieved" by that decision and his consent must be deemed to constitute a waiver of his right to an appeal from that decision. This necessarily subjects any such attempted appeal to dismissal. See Fuller v. Branch, 520 F. 2d 307, 309 (C.A. 6,

3/ Section 7483, Appendix, infra, permits a notice of appeal to be filed within 90 days after entry of a decision.

1975); Kelly's Trust v. Commissioner, 168 F. 2d 198, 199 (C.A. 2, 1948); Marks v. Leo Feist, Inc., 8 F. 2d 460, 462 (C.A. 2, 1925); 9 Moore's Federal Practice (2d ed.), par. 203.06, pp. 719-720. An entry of a consented decision by a court constitutes a judicial act which determines the merits of the parties' claims. Pope v. United States, 323 U.S. 1, 12 (1944).

Since the merits of taxpayer's claims with respect to the redetermination of their liabilities for the years 1966 and 1967 were conclusively resolved by their stipulation in the Tax Court, the consented decision so rendered is final, incapable of further review.[4/] See United States v. Zimmerman, 478 F. 2d 59, 62 (C.A. 7, 1973). Accordingly, taxpayers were not aggrieved by the decision of the Tax Court and their notice of appeal from that decision is wholly invalid. See Fuller v. Branch, supra. Because no appeal could be prosecuted by taxpayers from the instant decision, this appeal should be dismissed for lack of jurisdiction.

If this Court determines that the appeal should not be dismissed, then the decision of the Tax Court must be affirmed. In Swift & Co. v. United States, 276 U.S. 311 (1928), the Supreme Court outlined the limited grounds for possible review of a stipulated decision, as follows (276 U.S., p. 324):

4/ This Court has recognized that the Tax Court may vacate a decision which is otherwise final under Section 7481 upon a motion by the taxpayer showing that a fraud had been perpetrated on the court in entering the decision. Senate Realty Corporation v. Commissioner, 511 F. 2d 929 (C.A. 2, 1975). No such fraud has been asserted by taxpayers in this case and in any event, the necessary motion should be made in the Tax Court, not in a court of appeals.

> Decrees entered by consent have been reviewed upon appeal or bill of review where there was a claim of lack of actual consent to the decree as entered; Pacific R.R. Co. v. Ketchum, 101 U.S. 289, 295; White v. Joyce, 158 U.S. 128, 147; or of fraud in its procurement, Thompson v. Maxwell Land Grant Co., 168 U.S. 451; or that there was lack of federal jurisdiction because of the citizenship of the parties. Pacific R.R. Co. v. Ketchum, supra. Compare Fraenkl v. Cerecedo, 216 U.S. 295. But "a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause." Nashville, Chattanooga & St. Louis Ry. Co. v. United States, 113 U.S. 261, 266. Compare United States v. Babbitt, 104 U.S. 767; McGowan v. Parish, 237 U.S. 285, 295.

See also Walling v. Miller, 138 F. 2d 629, 631 (C.A. 8, 1943), cert. denied, 321 U.S. 784 (1944). There is no claim in this case that there was a lack of consent below,[5/] no allegation of fraud and no defect asserted in the Tax Court's jurisdiction (Section 6213 of the Code (26 U.S.C.). Taxpayers merely assert the existence of "mistake" and undisclosed "newly discovered evidence" as grounds for relief. Any such grounds, however, would go to the merits of taxpayers' claim and the law is clear that an appellate court must affirm the consented decision of a lower court where the claims on appeal relate only to the merits of the decision. See Swift & Co. v. United States, supra; Securities and Exchange Commission v. Dennett, 429 F. 2d 1303, 1304 (C.A. 10, 1970); United States v. All American Airways, Inc., 180 F. 2d 592 (C.A. 9, 1950). Accordingly, the decision entered below should be affirmed.

5/ While taxpayers assert (Br. 3) that a "mistake" was committed in entering into the stipulation in the Tax Court, they do not demonstrate any circumstances which would negate their consent.

The possible dispositions we have suggested to this Court would provide support for the rules of procedure governing litigation in the Tax Court. Rule 162 of the Rules of Practice and Procedure, United States Tax Court (Jan. 1, 1974), provides:

> Any motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit.

While any motion for vacation of a decision should, in the first instance, be made in the Tax Court, the grounds for granting such relief are limited to "fraud upon the court" once the decision has become final under Section 7481 (e.g., with the passing of the 90-day period for filing a notice of appeal). See Senate Realty Corp. v. Commissioner, 511 F. 2d 929 (C.A. 2, 1975); Taub v. Commissioner, 64 T.C. 741 (1975), aff'd, 538 F. 2d 314, 76-1 U.S.T.C., par. 9422 (C.A. 2, 1976). See also Pacific R.R. v. Ketchum, 101 U.S. 289, 296 (1879). A taxpayer should not be permitted to obtain a vacation of a consented decision on lesser grounds, such as "newly discovered evidence", by the artifice of filing a timely notice of appeal, and, after substantial delays in the appellate court, requesting relief otherwise falling within the province of the Tax Court.

It is inconceivable that taxpayers would suffer any legally cognizable harm by the dismissal of this appeal or the affirmance of the Tax Court's decision. The tax years involved herein are 1966 and 1967. The notice of deficiency was sent in 1973 and

taxpayers filed their petition in the Tax Court in October of that year. The consented decision was not entered until nearly two years later, in July 1975, and then only after a continuance of three months from the original trial setting was made by the Tax Court. After filing a notice of appeal in October, 1975, taxpayers took no action to prosecute the appeal for over a year. Now they make vague allegations of "mistake" and "newly discovered evidence" in an attempt to open the Tax Court's decision. Policy considerations favoring the finality of judicial decisions and the limitation of unnecessary strains on judicial resources 6/ require that taxpayers not be permitted prolong further this case in which they were given more than adequate time for marshaling any evidence which could possibly have supported their position.

6/ These considerations are given firm support in Rule 60(b) of the Federal Rules of Civil Procedure which provides that a motion for relief from judgment based on mistake or newly discovered evidence must be filed in the District Court within one year from the entry of judgment. Likewise, the statutory scheme governing finality of Tax Court decisions, with the attendant, and very narrow, exception of "fraud upon the court," assures both finality and undue preoccupation of the court's time.

CONCLUSION

For the above reasons, this appeal should be dismissed or, in the alternative, the decision of the Tax Court should be affirmed.

Respectfully submitted,

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MARCH, 1977.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on the appellants, who are appearing pro se, by mailing four copies thereof on this 23rd day of March, 1977, in an envelope, with postage prepaid, properly addressed to them as follows:

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7481. DATE WHEN TAX COURT DECISION BECOMES FINAL.

(a) Reviewable Decisions.--Except as provided in subsection (b), the decision of the Tax Court shall become final--

(1) Timely notice of appeal not filed.--Upon the expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time; or

(2) Decision affirmed or appeal dismissed.--

(A) Petition for certiorari not filed on time.--Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals and no petition for certiorari has been duly filed; or

* * *

SEC. 7482. COURTS OF REVIEW.

(a) Jurisdiction.--The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

* * *

SEC. 7483. NOTICE OF APPEAL.

Review of a decision of the Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.